Supreme Court, U.S.
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IN THE

United States Supreme Court

OCTOBER, 1994, TERM

DOUGLAS ROWLAND STARNES,

Petitioner,

VS. CASE NO: _____

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES SUPREME COURT
OCTOBER, 1994, TERM

DOUGLAS ROWLAND STARNES,
PETITIONER

VS. CASE NO:_____

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Defendant was denied due process of law by the refusal or failure of the Government to timely furnish a copy of the substance test results to him or his attorney?

2. Whether or not the District Court allowed the testimony by a lay witness to invade the province of the jury and decide the ultimate issue when the court permitted the lay witness to testify that based upon the amount involved, the Defendant intended to distribute the marijuana rather than to simply possess it?

3. Whether or not the District Court was in error in using 70 pounds of marijuana rather than 35 pounds of marijuana as a criterion for sentencing the Defendant?

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

This case was tried in the United States District Court for the Western District of Tennessee and was not reported; it was heard on Appeal by the United States Court of Appeals for the Sixth Circuit and that decision was reported at United States Court of Appeals for the Sixth Circuit, 1994 U.S. App. LEXIS 12505.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(a) The jurisdiction of this Court is invoked under the judicial discretion that this Court has to review decisions of the United States Court of Appeals.

(b) The date of the entry of the judgment sought to be reviewed is May 26, 1994.

(c) The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is Title 28 U.S. Code, Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONSINVOLVED

21 U.S. Code Section 841(a)(1)

provides as follows:

" Except as authorized by this Title, it shall be unlawful for any person, knowingly or intentionally _____

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance;

Title 18 U.S. Code Section 2 provides as follows:

PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The Fifth Amendment to the United States Constitution provides as follows:

Criminal actions -------- Provisions concerning Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emph. added).

STATEMENT OF THE CASE

The Court of the first instance is the United States District Court for the Western District of Tennessee, Western Division, in Memphis, Tennessee. The Sixth Circuit Court of Appeals is the Appellate Court for Federal District Courts in the State of Tennessee. The United States District Court for the Western District of Tennessee, Western Division, had Federal Jurisdiction because the Appellant/Petitioner was charged with violation of Title 21 United States Code, Section 841(a)(1) and Title 18 United State Code, Section 2 in an indictment returned by a Federal Grand Jury in the Western District of Tennessee, Western Division, which said indictment charged the Appellant/Petitioner with having committed offenses in the Western District of Tennessee and in the

Western Division of that United States District Court.

This is a case where the Petitioner, Alvin Wayne Godair, Patrick Kelly Fox, and David Christian Bullington, were charged with two counts in an indictment returned on November 16, 1992. Count 1 charged the Defendants with conspiracy to possess and distribute marijuana and Count 2 charged them with possession of 70 pounds of marijuana with intent to distribute; aiding and abetting. All four defendants were arrested on a criminal complaint on December 12, 1992. Patrick Kelly Fox and Alvin Wayne Godair entered a plea of guilty to both counts of the indictment and David Bullington and the Petitioner went to trial on April 5, 1993, with the jury returning a verdict of not guilty as to David Bullington on both counts and a verdict of guilty as to

the Petitioner on both counts on April 7, 1993. Fox testified at the trial that he and

Bullington had traveled from Memphis to Brownsville, Texas, and purchased the marijuana in October, 1992, and had it shipped back to Memphis in computer boxes. Fox stated that he flew back to Memphis and Bullington drove Fox's automobile back to Memphis. Fox also testified that he paid Bullington to rent storage bin #347 at U.S.A. Storage at 2625 Mt. Moriah in Memphis. Testimony showed that the marijuana in the computer boxes was shipped by Yellow Freight leaving Brownsville on October 9, 1992, arriving in Dallas on October 10, 1992, and arriving in Memphis, on October 11, 1992. Testimony at the trial further indicated that before the shipment left Brownsville, the operations manager at the freight trucking terminal had become

suspicious and had called the Drug Task Force which obtained a search warrant after their drug dog gave a positive alert to the presence of marijuana. Proof further showed that after the agents opened the containers and discovered the marijuana, the containers were re-sealed and sent on to Memphis. The testimony further indicated that officers of the Memphis Organized Crime Unit and Drug Enforcement Agency went to the Yellow Freight Terminal where the trailer was opened and photos were taken on October 11, 1992, and that on October 12, 1992, the officers went back to the terminal when an individual who identified himself as David Wayne of Wayne Electronics, came to the terminal stating that he wanted the shipment delivered to storage bin #347, and the dispatcher advised him that the shipment was in route. That

when the delivery arrived at U.S.A. Storage at approximately 10:00 a.m., the individual who identified himself as David Wayne, flagged down the truck and had the delivery person follow him to bin #347 where he opened the padlock and the driver and undercover officer removed all 10 boxes and put them inside bin #347. The individual receiving the boxes signed the shipping bill as David Bullington and after his arrest, was identified as David Christian Bullington. Patrick Kelly Fox was arrested at a nearby restaurant and he agreed to assist officers in a controlled delivery to his partner, Wayne Alvin Godair. Godair was then arrested at approximately 6:30 p.m. when he came to meet Fox and started unloading boxes from the back of a Memphis Police Department undercover car into his 1988 Toyota pick-up. Godair then agreed to cooperate and

called the Petitioner to meet him in a shopping center parking lot to pick up 5 boxes labeled computer parts. Petitioner met Godair at the pre-arranged meeting place shortly after 9:00 p.m., and while the Petitioner and Godair put four of the boxes into the trunk of Petitioner's automobile, the officers moved in and arrested the Petitioner. At the time of the arrest, the Petitioner told officers he thought he was picking up computer parts. Godair testified that the Petitioner had furnished almost $30,000.00 for the purchase of the marijuana and Fox testified that Petitioner had provided $20,000.00 to $21,000.00 for the purchase of the marijuana. Andrea Bobo, a girlfriend of Mr. Fox, also claimed that she had seen the Petitioner give over $20,000.00 to Fox before the marijuana purchase was made.

During the course of the trial,

the government introduced expert testimony and a report to establish that the substance was, in fact, marijuana. The attorney for Petitioner objected to the testimony and the report on the basis that he had not been furnished a copy of the report. In paragraph numbered 4 of his reply to a request for discovery, the U.S. Attorney had stated on December 18, 1992, that the defense would be provided with copies of applicable toxicology reports when they became available. Also, during the course of the trial, the Court permitted Godair to testify or give his opinion that the amount of marijuana the Petitioner was attempting to obtain showed that the Petitioner intended to distribute the marijuana rather than just to possess the marijuana. The defense attorney objected to this testimony. To this objection, the Court stated, "I will

overrule the objection. This is not in the nature of an expert opinion." The U.S. Attorney stated to the Court that he wanted to ask the witness to testify from his own experience. The Court agreed, stating, "based on his experience." The U.S. Attorney then asked, "is this an amount that you, yourself, would normally associate with personal use or distribution?" the witness replied, "distribution." Again, the defense attorney objected as the U.S. Attorney pressed onward, as to the relevance of such questioning. To which the Court responded, "It's not directly relevant unless it helps the jury -- is the question being asked to give the jury an idea of what would be a quantity for persona use?" After the U.S. Attorney repled, "exactly, Your Honor," the Court replied, "I will permit the question." The U.S. Attorney then asked the question

a different way, asking Godair how much marijuana he would buy if he were going to buy marijuana for his personal use. To which Godair responded, "a quarter ounce."

The Petitioner was convicted by a jury on April 7, 1993, was sentenced by the Court on June 28, 1993, after the Court had denied motions for a new trial on June 28, 1993.

At the sentencing of the Petitioner, the court determined that 70 pounds of marijuana, as urged by the probation officer doing the pre-sentence report, was the quantity that the court should use in sentencing the Petitioner. The Court acknowledged that the testimony in the case did not show that the Petitioner ever intended to obtain 70 pounds but justified the amount of 70 pounds as being fair because one of the Co-Defendants had testified that

he and the Petitioner had engaged in other transactions involving 30 pounds plus.

The Court then used 70 pounds of marijuana and applied the guidelines for sentencing of the Petitioner based upon that quantity of marijuana.

The Petitioner felt aggrieved by the verdict of the jury and rulings by the trial Court and appealed his conviction and sentencing to the United States Court of Appeals for the Sixth Circuit. On May 26, 1994, the Court of Appeals affirmed the conviction and sentencing of the Petitioner. Petitioner seeks relief in this Court because of the erroneous decision of the Court of Appeals.

ARGUMENT

During the course of the trial, the government sought to prove that the alleged illegal controlled substance was marijuana and called as its witness, Mr. Harold Stephen Nichols, the superintendent of Solid Dosage Section at the University of Tennessee Toxicology Lab. After Mr. Nichols had been qualified as an expert by the government, the assistant U.S. Attorney was laying the predicate to ask him if he had tested the substances and if he could state in his expert opinion what the substances were. At that point, the defense attorney objected and asked to approach the bench. The objection was based on the fact that in his discovery response of December 16, 1992, the U.S. Attorney had stated in

paragraph four of the letter that reports would be made available to the defense when available. The defense attorney stated that he had never received such a report even after this trial had begun on April 5, 1993.

The U.S. Attorney mistakenly argued that the report would be presented in accordance with the dictates of the Jencks Act and further stated that he believed the report had just been prepared yesterday. If that statement by the U.S. Attorney was accurate, then it means he started the trial without having a report that the controlled substance was marijuana. The Court did not accept this legal argument but stated that the defense could not be prejudiced if the U.S. Attorney turned it over to the defense before Mr. Nichols resumed his testimony and over the objection of the defense

attorney, the witness was permitted to testify that the substances were marijuana.

The Court did not even require nor did the U.S. Attorney offer any explanation as to why he had failed to obtain a report and furnish it to the Defendant as required by Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure. Since the trial court was located in Memphis, Tennessee, and the University of Tennessee Toxicology Lab was also located in Memphis, Tennessee, just a few blocks from the Federal Building, there can be no valid excuse for the trial to have begun when the government had failed to provide the most important information in the case, i.e., what the test showed concerning the alleged illegal substances. This increasingly used strategy tactic, or maneuver, on the part of prosecuting attorneys not to

obtain in their personal possession lab reports or results until it is too late for the defense attorney to have his own private test conducted or to prepare for an effective cross-examination of the expert witness is a denial of due process of law and it matters not whether the last minute securing of a report is a result of a lack of diligence on the part of the prosecutor or intentional "sandbagging" on his part.

The Courts have continued to excuse such inadvertent or intentional actions of prosecutors by saying the problem can be cured by granting a recess and allowing the defense attorneys to review the most damaging evidence in the case just minutes before having to match wits with an expert in a field where the defense attorney has no expertise. If the Courts required the government to obtain and produce such reports

far enough in advance of trial to provide same to the defense attorney, then the defense attorney could request to have his own tests performed by a non-state or non-government employee. Also, the defendant could consult with an independent toxicology expert to assist him in preparing intelligent and necessary cross examination questions to propound to the government's expert in an effort to challenge the authenticity of those results and the accuracy or inaccuracy of the methods used to determine the nature or identity of substances being tested. As long as the Courts continue to excuse these inexcusable actions on the part of prosecutors, the prosecutors are going to continue to have, "just received the report yesterday." It is difficult to understand why Courts in civil cases will exclude evidence

offered by a party if that party and his attorney have failed to comply with discovery rules but then turn around and grant blanket immunity to government prosecutors from any sanctions for their continued disregard for discovery requirements. Likewise, it is discouraging to defense attorneys to see Courts hold their feet to the fire on a criminal procedure rule, e.g., Rule 12.1, notice of alibi, or Rule 12.2, notice of insanity defense, and then pat the government prosecutor's hand when he ignores the requirements of Rule 16(a)(1)(D).

It is inconceivable that many Courts take the position that by simply granting a brief recess, the defendant is not damaged by the government's failure to comply with Rule 16(a)(1)(D). The defense attorney in this case declined to even question the expert witness

which was exactly the desired result of the government. Had the report been furnished to the defense attorney as required by Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure and had he had the opportunity to consult with an independent toxicology expert, he might have been able to have weakened the testimony of the government's expert or to have raised some doubts as to the accuracy or authenticity of the tests employed, e.g., having the witness concede what margins of error there might have been in the tests employed. In this case, we will never know because the government prosecutor, "just received the report yesterday." Rule 16(a)(1)(D) was not adopted for the purpose of allowing government prosecutors to waltz into the courtroom and produce such a damaging report during the trial. This Rule, like all other rules of

discovery, requires the exercise of due diligence by all attorneys in complying with the rules of discovery. There might be circumstances where a report could not be obtained for reasons beyond the control of the prosecutor, but those reasons should be made known to the Court. Instead of shifting the burden to the defendant and telling him and his attorney, you cannot be prejudiced if the government doesn't comply with discovery rules so long as the Court gives you a brief recess to read the report, Courts must mandate that the prosecutors comply with this rule by producing such reports to the Defendants in advance of trial in order that they can properly prepare for trial or justice will continue to suffer and prosecutors will continue to have, "just received the report yesterday."

Rule 16 (a)(1)(D) of the Federal Rules of Criminal Procedure provides that the government shall permit the defendant to inspect and copy or photograph any results of reports of scientific tests or experiments or copies thereof which are within the possession, custody or control of the government, the exercise of due diligence may become known, to the attorney for the government and which are material to the preparation of the defense or are intended for use by the government as evidence in chief, at the trial

Rule 16 (d)(2) of the Federal Rules of Criminal Procedure provides sanctions for the Court to utilize when the government fails to comply with the discovery request. Under this Rule, the Court, in its discretion, may order the government to permit the discovery or inspection, grant a continuance or

prohibit the government from introducing the evidence not disclosed.

In United States of America vs. Donna Gail Williams, 708 F.2d 730 (1983), the Court of Appeals for the Sixth Circuit refused to reverse a conviction wherein the government had failed to produce a finger print analysis but the Court held that in that case, the trial Court recessed the proceeding to enable defense counsel to review the report in issue and since the defendant had failed to identify any prejudice arising out of the government's failure to disclose the report which was not completely eliminated by the trial court's remedy, the conviction was affirmed.

The case of United States vs. Noe, 821 F.2d 604 (11th Cir. 1987), involved a situation wherein the government used undisclosed tape

recordings of telephone conversations between an undercover agent and the defendant in rebuttal to impeach defendants's alibi defense. The 11th Circuit reversed the defendant's conviction and held that the government had denied the defendant an adequate opportunity to prepare his defense to meet the rebuttal evidence. The case of United States vs. Iglesias, 881 F.2d 1519 (9th Cir. 1989) held that a lab report is clearly a "report" or a "result" and thus does indeed fall within the meaning of Rule 16 (a)(1)(D) of the Federal Rules of Criminal Procedure.

In United States vs. Kelly, 420 F.2d 26 (2nd Cir. 1969), the Second Circuit reversed a conviction wherein the government did not inform the defendants of a neutron activation test they had conducted on alleged seized drugs. The Second Circuit stated that it was important that the

defense be given a chance to research the techniques and results of scientific tests taken by the government. They felt that the course of the government smacked too much of a trial by ambush. In a similar case in the Sixth Circuit, United States vs. Stifel, 433 F.2d 431 (6th Cir. 1970), the Court held that where the government sought to use the neutron activation analysis, it must both allow time for the defendant to make a similar test and in the instance of an indigent defendant, a means to provide for payment for same. In the case of United States vs. Wicker, 848 F.2d 1059 (10th Cir. 1988), the District Court granted defendant's motion to suppress the report reflecting test results performed on materials confiscated from defendant's room and also the testimony of the expert who prepared the report based on the

government's failure to timely produce the report for the defendant. The government appealed and the 10th Circuit affirmed the holding of the District Court citing the case of United States vs. Campagnuolo, 529 F.2d 852, 858 (5th Cir. 1979).

The disclosure of the report on the substance testing in this case was mandatory in order for due process of law to exist. This disclosure was required far enough in advance of trial for the Petitioner to have same reviewed by an expert of his choice. Even if scientific tests by the Petitioner had also concluded that the substance was marijuana, the defense counsel would have had available to him the advice and expertise of a witness that could have prepared the defense attorney to conduct an effective cross examination of the government's expert when he testified. Such an

effective cross examination could very likely have changed the outcome of this trial and the admission of the report and the expert testimony without affording the Petitioner this opportunity amounted to a denial of due process of law. Whether intentional or because of lack of diligence, the government attorney cannot withhold such reports from the Petitioner. After all, the evidence at all times was in the control and custody of the government in that its expert was a government employee and such evidence and test results were mandated by Rule 16 to be made available to the Petitioner regardless of whether or not the government attorney had gotten around to having same sent to his office.

Even though it is Petitioner's contention that his conviction should be reversed for the reasons stated herein, supra, the more egregious of

the two reversible errors committed by the Court below was the trial court's allowing a co-defendant, non-expert witness to give his personal opinion concerning whether or not the Petitioner was obtaining marijuana for distribution or whether the Petitioner was obtaining that quantity of marijuana for his own personal use. The U.S. Attorney did not seek nor did the witness disclose any evidence in his answers that there was any plan that he was aware of on the part of Petitioner to distribute marijuana.

He was asked by the U.S. Attorney to state in his opinion whether the quantity involved showed the intention of the Petitioner to simply possess the marijuana or to distribute the marijuana and the Court permitted him to give his opinion based upon his own experience. Since the Petitioner was

charged with conspiracy to possess marijuana with the intent to distribute and with possession of marijuana with intent to distribute in the two counts of the indictment, his co-defendant was allowed by the Court to give a lay witness legal opinion or legal conclusion that the Defendant was guilty of having the intent to distribute marijuana. Of course, this same co-defendant who was allowed to express such an opinion was a person who had made a plea bargain with the government and who was attempting to help himself as much as he could while testifying against the Petitioner. Under such circumstances it is incredible that such a witness would be permitted by the Court to testify and give his opinion on one of the ultimate issues to be decided by the jury. Over the objections of the defense attorney, the co-defendant was allowed to

testify that the amount involved would be associated with distribution rather than personal use and then again over the objection of the defense attorney, the witness testified that a quarter ounce of marijuana was the amount you would purchase for personal use.

In the case of United States vs. Zipkin, 729 F.2d 384 (6th Cir. 1984), the testimony of a bankruptcy judge brought in as an expert on bankruptcy law gave his legal conclusion or opinion that the applicable law had been violated. Even though the witness was unquestionably an expert on bankruptcy law, this Court reversed the conviction because it held that the testimony amounted to a statement that under the applicable law, the defendant was guilty. Again, in the 6th Circuit case of United States vs. Zeman, 1992 U.S. App. Lexis 29842, Case No: 92-5097,

at the trial, counsel for defendant had sought to ask another attorney if there was anything illegal in what he and the defendant had done. The lower court had prohibited the testimony noting that "that's for the jury to decide under the instructions of the Court." The Sixth Circuit Court agreed that witnesses' legal conclusions are properly excluded as not otherwise admissible citing United States vs. Torres, 758 F.2d 147 (6th Cir. 1985). The majority felt that such opinions are not helpful to the jury because they convey the witness's unexpressed and perhaps erroneous legal standards. The Court felt that the lower court had not abused its discretion in excluding such testimony as it might invade the province of the Court and jury to instruct and apply the law respectively. Similar holdings have been rendered by the United States

Courts of Appeal for the Fifth Circuit, the Eighth Circuit, and the Tenth Circuit. See United States vs. Southers,583 F.2d 1302 (5th Cir. 1978); United States vs. Ness, 665 F.2d 248 (8th Cir. 1981); United States vs. Pino, 606 F.2d 908 (10th Cir. 1979); and Specht vs. Jensen, 853 F.2d 805 10th Cir. 1988).

In arriving at the conclusions or opinions set out in the above cited cases the Courts have felt that the inherent danger in such opinion testimony would be that jurors might accord too much weight to the pronouncement of a lay witness unfamiliar with the standards erected by the criminal law.

At the sentencing hearing that occurred on June 18, 1993, the court applied the amount of 70 pounds of marijuana as being the correct quantity to be used by the Court in following the guidelines for the

sentencing of the Petitioner.

The facts in the case clearly demonstrate that this Petitioner should not be responsible for more than thirty-five pounds of marijuana, when taking all evidence in the light most favorable to upholding the findings of the presentence report as recommended or determined.

All of the factual testimony of the trial transcript lends itself to the idea that Douglas Starnes had no knowledge of any amount of marijuana over that which he supposedly sought to purchase (i.e., thirty-five pounds). There was no testimony that Douglas Starnes knew of any other marijuana that Patrick Fox or Wayne Godair might be transporting except that which would supposedly be sold to him.

The government witnesses had testified that they were paying $500.00 to $600.00 per pound for

marijuana bought in quantities of 30 to 40 pounds. These same witnesses indicated that Petitioner had given them approximately $20,000.00 in cash which at $600.00 per pound would have purchased only about 35 pounds of marijuana. Rationally, the Petitioner could not have expected any more than 35 pounds based on the testimony of government witnesses. In fact, the government witness, Godair, testified that Starnes was to get 35 to 40 pounds and on cross examination admitted that the remainder of the 70 pounds was supposed to belong to the other government witness, Mr. Fox.

All of this evidence indicates that the Petitioner never anticipated being associated with any more than thirty-five pounds.

The Sentencing Commission Guidelines Manual states under Section 2D1.4 Attempts and

Conspiracies (p. 91 of Manual), that:

If the Defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the Defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the Court shall exclude from the guideline calculation the amount that it finds he Defendant did not intend to produce and was not reasonably capable of producing.

At the same time, this section refers the reader to Section 1B1.3 (Relevant Conduct). Under application notes number 1 of

Section 1B1.3, (p. 17 of Manual) the manual states:

Where it is established that the conduct was neither within the scope of the Defendant's agreement, nor was reasonably foreseeable in connection with criminal activity the Defendant agreed to jointly undertake, such conduct is not included in establishing the Defendant's offense level under this guideline.

According to the trial testimony, Mr. Starnes obviously did not intend, nor did he in actuality, negotiate for any amount of marijuana

over thirty-five pounds. Mr. Starnes is in no way established by witness testimony as having any conduct involving a conspiracy for more than thirty-five pounds of marijuana.

The Courts have made some general pronouncements with regard to general principles to be used for guidance in making findings of fact to enhance a Defendant's offense level. United States vs. Cashin, 949 F.2d 397 (6th Cir. 1991). Quoting United States vs. Walton, 908 F.2d 1289 (6th Cir.), cert. den., 111 S.Ct. 532 (1990), the Cashin Court said:

> ..[F]indings of fact used to enhance a Defendant's offense level must generally be supported by a preponderance of the evidence...We believe that the guidelines do not permit the District Court to hold a Defendant responsible for a specific quantity of drugs unless the court can conclude the Defendant is more likely than not actually responsible for a quantity greater than or equal to the quantity for which the Defendant is being held responsible...Thus when choosing between a number of plausible estimates of drug quantity, a

Court must err on the side of caution. United States vs. Walton, at 1302.

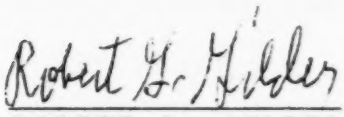
The Cashin Court went even further and stated that, "it is often difficult or impossible to determine the precise quantities involved in drug operations" and Courts should, "act cautiously in making estimates".

The points attributed to Mr. Starnes with regard to the amount of marijuana he is said to possess should be reduced from 18 to 16. The total amount of 70 pounds is beyond the scope of and not reasonably foreseeable in connection with his plans to purchase 35 pounds.

Petitioner would represent that the Sixth Circuit Court of Appeals has sanctioned a departure by the United States District Court for the Western District of Tennessee from the accepted and usual course of judicial proceedings as to demand

that this Honorable Court exercise its power of supervision.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the above and foregoing Petition was delivered to Honorable Christopher Cotten, Asst. U.S. Attorney, 167 North Main, Room 1026, Memphis, Tennessee 38103, and to the Solicitor General, Department of Justice, Washington, D.C., 20530 on this the _____ day of _____, 19_____.

Robert G. Gilder

ROBERT G. GILDER

FILED

94 507 AUG 24 1994

OFFICE OF THE CLERK

IN THE

United States Supreme Court

OCTOBER, 1994, TERM

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VS. CASE NO: _____

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Respondent.

APPENDIX

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IN THE UNITED STATES
SUPREME COURT
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VS. CASE NO:_____

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IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF
TENNESSEE

UNITED STATES OF AMERICA,
PLAINTIFF

VS. CR. NO: 92-20328-G

DOUGLAS ROWLAND STARNES
DAVID CHRISTIAN BULLINGTON,
DEFENDANTS

ORDER ON JURY VERDICT

This cause came on for trial on April 5, 1993, the United States Attorney representing the Government and the defendants, Douglas Rowland Starnes and David Christian Bullington, appearing in person and with counsel, Mr. Edwin Lenow and Mr. William Craig Hall, respectively.

Jurors were selected and sworn and opening statements were presented by counsel. After listening to all the evidence, arguments of counsel, and charge of the Court, the Jury began its deliberations. After due deliberations, the Jury returned into

open court on April 7, 1993, and announced a verdict of Not Guilty as to Defendant, David Christian Bullington. Defendant, David Christian Bullington is hereby dismissed from case. The Jury, as to defendant, Douglas Rowland Starnes, announced a verdict of Guilty to Count One and Two as charged in the indictment.

Sentencing will be set upon completion of the presentence report. In the meantime, defendant may remain on his present bond.

IT IS SO ORDERED this 19th day of April, 1993.

JULIA SMITH GIBBONS
UNITED STATES DISTRICT
COURT JUDGE

CHRISTOPHER E. COTTEN
ASSISTANT UNITED STATES
ATTORNEY

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF
TENNESSEE

UNITED STATES OF AMERICA,
PLAINTIFF

VS. CR. NO: 92-20328-G

DOUGLAS ROWLAND STARNES
DEFENDANT

ORDER ON MOTIONS FOR NEW TRIAL

Presently before the Court are the defendant's motions for new trial, which were heard on June 18, 1993. For reasons expressed and referred to at that hearing, those motions are denied.

IT IS SO ORDERED. This 28th day of June, 1993.

HONORABLE JULIA SMITH
GIBBONS
UNITED STATES DISTRICT JUDGE

APPROVED:
DANIEL A. CLANCY
United States Attorney

BY: _____
CHRISTOPHER E. COTTEN
Asst. United States Attorney

No: 93-5931

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

DOUGLAS ROWLAND STARNES,

Defendant-Appellant.

Decided and Filed _____

BEFORE NELSON and NORRIS, Circuit Judges, and ENGLE, Senior Circuit Judge.

PER CURIAM. The Defendant was found guilty by jury of participating in a conspiracy to distribute marijuana and to possess the drug with intent to distribute it, all in violation of 21 U.S.C. Section 846. He appeals his conviction and sentence, contending (1) that a violation of his due process rights occurred when a

forensic toxicologist was allowed to identify the substance in question as marijuana notwithstanding that the government had failed to provide the defendant a copy of the laboratory test results in advance; (2) that the district court erred in allowing a co-conspirator to testify that a purchase of 35 to 40 pounds of marijuana would be associated with distribution rather than personal use; and (3) that the district court erred in determining the quantity of marijuana involved in the conduct deemed relevant for sentencing purposes. Finding none of these contentions persuasive, we shall affirm both the conviction and the sentence.

I.

The defendant, Douglas Starnes, was indicted on the marijuana charges in November of 1992. Also charged in the indictment were Alvin Godair,

Patrick Fox and David Bullington. Messrs. Godair and Fox entered into pretrial plea agreements with the government, while Bullington and Starnes chose to stand trial. Mr. Starnes was convicted, and Mr. Bullington was acquitted. On June 18, 1993, Starnes was sentenced to a prison term of 78 months; this appeal followed.

The evidence indicated that in October of 1992 Messrs. Fox and Bullington travelled from Memphis to Brownsville, Texas, where they purchased some seventy pounds of marijuana and arranged to have it shipped to Memphis in computer boxes. A manager at the freight company became suspicious and summoned police officers. A police drug dog reacted positively to the boxes, whereupon the officers obtained search warrants and opened the containers. Finding marijuana inside, they resealed the

boxes, sent them on to Memphis, and notified law enforcement officials in that city. When the boxes arrived in Memphis, local police officers and agents of the Drug Enforcement Agency arrested Messrs. Bullington and Fox as they attempted to take delivery of the containers.

Mr. Fox agreed to cooperate with the officials, and they arranged a controlled delivery of the boxes to Mr. Godair. He was arrested too, and likewise agreed to cooperate with the officers. Godair then called Mr. Starnes and arranged to deliver the boxes to him at a shopping center parking lot. It was there that Mr. Starnes was arrested, after four of the boxes had been loaded into the trunk of his car.

Godair, Fox and Fox's girlfriend all testified at trial that Mr. Starnes had paid between $20,000.00 and $30,000.00 to purchase some

thirty-five to forty pounds of the marijuana contained in the boxes. Starnes, on the other hand, testified that he believed that the boxes contained "children's computers"; he said that he had agreed to pay less than one hundred dollars for them.

Forensic toxicologist Harold Nichols took the stand as a government witness. Mr. Nichols had analyzed the substance found in the boxes and concluded that it was marijuana. Mr. Starnes objected to this witness being all owed to testify, Starnes not having received a copy of the toxicology report in advance of the testimony. (Starnes had previously requested any such report under Rule 16, Fed. R. Crim. P., but the government had failed to produce a copy.) The prosecutory told the court that the report had been prepared only the day before and that the government had not been

withholding it from the defendant intentionally. Observing that the government "probably should have gone ahead and given it to [Starnes] yesterday," the court found that the defendant would not be prejudiced if the report were submitted to him for inspection prior to Mr. Nichols testimony. Mr. Starnes did not request a recess or a continuance, and he did not cross-examine Mr. Nichols.

Wayne Godair also testified as a government witness. He told the jury that defendant Starnes had made approximately five trips from Tennessee to Texas to purchase marijuana. Godair said that he accompanied Starnes on some of these trips and that Fox accompanied him on others, but that he (Godair) profited financially from each of the trips. He acknowledged that he had been convicted in 1984 and 1989 on charges

of possession of marijuana with intent to distribute it. After this testimony was given, the government asked Godair the following question:

> "Now, as somebody who has been in the marijuana business yourself, is [thirty-five to forty pounds of marijuana] a quantity you would associate with personal use or a quantity you would associate with distribution?"

The defendant objected, arguing that the government be required to "qualify the witness a little bit further." In response, the government argued that Mr. Godair was testifying based on his extensive personal experience in the marijuana business. The court overruled the objection, and Mr. Godair stated that such an amount would normally be associated with distribution.

Mr. Godair was then asked this question: "Say you were going to buy some marijuana for your personal use, how much would you buy at one time?" Again, the defendant objected, and

again the objection was overruled. Godair testified that if he were buying marijuana for personal use, he would buy one-quarter of an ounce.

II.

A

We turn now to the belated toxicology report. It is well established that the Due Process Clause of the Fifth Amendment does not guarantee a criminal defendant any right to discovery of evidence the government intends to use at trial. Weatherford vs. Bursey, 429 U.S. 545, 559 (1977). The delay in producing the report thus did not amount to a constitutional violation.

Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure provides that, "[U]pon request of a defendant the government shall permit the defendant to inspect and copy....any results or reports of...scientific tests...which are within the

possession, custody, or control of the government..." Subsection (d) of the rule vests the trial court with discretion to enforce discovery requests through orders "prescrib[ing] such terms and conditions [of discovery] as are just." See United States vs. Glover, 846 F.2d 339, 342 (6th Cir.), cert. denied, 488 U.S. 982 (1988). Absent a showing of willful impropriety in the withholding of evidence, a trial court is not required to exclude evidence that should have been turned over to an adverse party during discovery; such exclusion is, however, an option the court may exercise in enforcing Rule 16. United States vs. Bartle, 835 F.2d 646, 649 (6th Cir. 1987), cert. denied, 485 U.S. 969 (1988).

No willful impropriety has been shown in the case at bar, and we do not believe that the trial court

abused its discretion in allowing the toxicologist to testify. Although Mr. Starnes had not seen the toxicology report until just before the testimony was given, he did not ask for a recess to examine the report with care. Neither did he request a continuance so that he could submit the report to independent experts for evaluation. In these respects this case resembles United States vs. Kubiak, 704 F.2d 1545 (11th Cir.), cert. denied, 464 U.S. 852 (1983), which our court cited with approval in Bartle, 835 F.2d at 650. In the Kubiak case, the Eleventh Circuit stated:

> "The appellant simply asserts that the government's untimely disclosure of the lab report denied him his right to effectively challenge the report or pursue further discovery concerning the evidence or the government witness. We note, however, that the only step taken by the defense to relieve itself from the predicament it now complains of, was its request that the chemist's testimony be stricken from the

> record. The defense never asked for a recess, let alone a continuance, to give it an opportunity to review the report...To put is simply, the prejudice now complained of by the appellant 'could perfectly well have been [rectified] by a recess. Absent such a request the court cannot be faulted for having denied the request to preclude the [g]overnment from alluding to the [report] in question." 704 F.2d at 1552 (citations omitted.)

Mr. Starnes did not contend at trial that he was unfairly surprised by Mr. Nichols' proffered testimony, nor did he complain that his lack of access to the report had left him inadequately prepared to proceed. He merely requested that the report and Mr. Nichols' testimony be excluded. The trial court did not abuse its discretion in denying the request.

B

The defendant also challenges his conviction on the ground that the trial court improperly allowed Mr. Godair to express an opinion on the ultimate issue of Mr. Starnes' guilt,

a question within the exclusive province of the jury. We see on impropriety in mr. Godair's testimony. Mr. Godair was shown to have been personally involved in the business of dealing in marijuana, and based on his personal experience he testified that a purchase of thirty-five to forty pounds of marijuana would be associated with distribution rather than personal use. Such testimony did not amount to an impermissible legal conclusion. The normal order of magnitude of purchases of marijuana for personal use is a question of fact, just as the orders of magnitude that could be expected in purchases for redistribution constitutes a question of fact. The witness was subject to cross-examination on the extent of his knowledge on these matters, and Mr. Starnes was free to try to impeach his credibility by showing

that it would be in Godair's interest to curry favor with the government. Godair's testimony was relevant and probative, and the court did not err in admitting it.

III

Mr. Starnes attacks his sentence on the ground that the district court held him responsible for a larger amount of marijuana than it should have done. Based on the trial testimony of Messrs. Godair and Fox, the court held Mr. Starnes responsible for two shipments that preceded the one for which he was convicted: a shipment of thirty pounds of marijuana from Texas to Tennessee early in the summer of 1992, and another shipment of thirty pounds about a month later. The court found that the defendant was involved in the planning and execution of both shipments, and that these shipments, like the October

shipment for which Starnes was convicted, were part of the same distribution scheme. The court also held Starnes accountable for the entire seventy pounds of marijuana shipped in October, 1992, notwithstanding Starnes' claim that he planned to purchase only half of that shipment. These findings led to Starnes being assigned a base offense level of 20 under the United States Sentencing Guidelines.

U.S.S.G Section 1B1.3(a)(2) provides that, in setting the base offense level for a defendant convicted of a narcotics distribution crime, the court should consider "all acts and omissions...that were part of the same course of conduct or common scheme or plan as the offense of conviction." Trial testimony by Mr. Starnes' co-conspirators provided the court with an ample factual basis for concluding that the course of

conduct that cultivated in Starnes' arrest reached back at least to the summer of 1992 and encompassed the two prior shipments. The testimony was not too vague to support the court's finding.

It is not necessary for us to resolve the question of whether Starnes should have been held responsible for the full 70 pounds of marijuana in the October shipment, or only half that amount, because his base offense level would have been the same in either case. If held responsible for only thirty-five pounds (15.876 kg) in October, he would still have had a base offense level of 20 when the 27.216 kg from the earlier shipments were added in. (Anything between 40 kg and 60 kg. yields a base offense level of 20, and Mr. Starnes would have been responsible for more than 43 kg even if only half the October shipment had

been counted.

The defendant's conviction and sentence are AFFIRMED.

SENTENCING COMMISSION

GUIDELINES MANUAL SECTION 2D1.4

Section 2d1.4 Attempts and Conspiracies

(a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

Commentary

Statutory Provisions: 21 U.S.C. Sections 846, 963, For additional statutory provision(s), see Appendix A (Statutory Index)

Application Notes:

1. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not

reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application Note 1 to Section 1B1.3 (Relevant Conduct).

2. Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

3. See Commentary to Section 2D1.1 regarding weapon possession.

Section 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guidelines specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offence of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which Section 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plane as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable

guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. Conduct "for which the defendant would be otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. Section 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant "would be otherwise accountable" includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actual unloaded, and notwithstanding any claim on his part that he was neither aware of, or could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which $15,000.00 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement

on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a downpayment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check. Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount ($55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire $55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.